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Nordson (M) Sdn Bhd v Lee Chin Tao & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–326 OF 2009
LOW HOP BING, AZIAH ALI AND ANANTHAM KASINATHER JJCA
25 JANUARY 2012

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Labour Law — Employment — Retrenchment — Redundancy of positions after restructuring of company — Rules of redundancy — Whether appellant complied with principle of 'last in, first out'

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The appellant had applied for a judicial review at the High Court to quash the Industrial Court Award No 437 of 2006. The application was dismissed and the appellant appealed against the decision to the Court of Appeal. The first respondent entered into the appellant's employment as sales manager on 7 April 1997 followed by one Cheong Pak Fatt ('Cheong') who also joined the appellant company as a sales manager of another department on 22 November

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1995. Cheong was later promoted to the position of technical services manager effective 1 November 1996. As time passed, both the first respondent and Cheong were promoted to become heads of their respective departments. However, in 2001, due to fluctuating business opportunities, the company was restructured again and the two sales departments managed by the first

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respondent and Cheong were consolidated. The first respondent's position then became redundant and he was issued a retrenchment letter. In the High Court, it was the first respondent's case that the appellant had not complied with the principle of 'last in, first out' ('LIFO') and it had failed to make any reasonable measures look for an alternative employment. The first respondent

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further contended that since Cheong was appointed as a sales manager in late 1998, Cheong was his junior yet he was not retrenched. The appellant averred its act of retrenching the first respondent was for a just cause or excuse, consistent with the principle of 'last in first out' ('LIFO'). The Industrial Court found in favor of the first respondent, adding that the appellant was not in a

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weak position that he needed to retrench the first respondent. The learned judge agreed with the Industrial Court's findings. On appeal, the appellant's counsel submitted that both the Industrial Court and the learned judge had erred in finding that it had not complied with the LIFO principle.

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Held, allowing the appeal and setting aside decision of the High Court:

(1) The Industrial Court and the learned judge have erred in finding that the termination of the first respondent's employment was without just cause or excuse. Based on the evidence, the court found that the appellant had complied with the principle of LIFO (see paras 9 &15).

(2) The Industrial Court and the learned judge have both erred in finding that the first respondent as manager was more senior to Cheong. As evinced by the appeal record, Cheong was, in actual fact, a senior to the first respondent in terms of both service and as a manager. The first respondent was appointed as the sales manager on 7 April 1997 while Cheong who joined in the appellant company on 22 November 1995 was appointed technical services manager effective 1 November 1996 (see para 9).

(3) There was no obligation on the appellant to offer or secure an alternative employment for the first respondent on account of the restructuring exercise validly carried out (see para 14).

(4) The Industrial Court had erred when it proceeded to determine whether the reason for the first respondent's retrenchment was made out based on a reason not relied on by the appellant. The letter of termination had stated that due to fluctuating business opportunities, the appellant had undertaken the restructuring exercise in order to face the slackening demands for the company's products. Nowhere in the said letter of termination did the appellant state that it was in a weak financial position (see para 13).

[Bahasa Malaysia summary

Perayu telah memohon untuk semakan kehakiman di Mahkamah Tinggi bagi membatalkan award Mahkamah Perusahaan No 437 Tahun 2006. Permohonan tersebut telah ditolak dan perayu merayu terhadap keputusan Mahkamah Rayuan. Responden pertama mula bekerja dengan perayu sebagai pengurus jualan pada 7 April 1997, diikuti dengan Cheong Pak Fatt ('Cheong') yang turut menyertai syarikat perayu sebagai seorang pengurus jualan jabatan lain pada 22 November 1995. Cheong kemudian telah dinaikkan pangkat kepada jawatan perkhidmatan pengurus teknikal berkuat kuasa mulai 1 November 1996. Dengan peredaran masa, kedua-dua responden pertama dan Cheong telah dinaikkan pangkat untuk menjadi ketua-ketua jabatan masing-masing. Walau bagaimanapun, pada tahun 2001, kerana peluang perniagaan yang berubah-ubah, syarikat tersebut telah disusun semula sekali lagi dan kedua-dua jabatan jualan yang diuruskan oleh responden pertama dan Cheong digabungkan. Kedudukan responden pertama kemudiannya menjadi berlebihan dan dia telah diberikan surat pemberhentian kerja. Di Mahkamah Tinggi, adalah kes responden pertama bahawa perayu telah tidak mematuhi prinsip 'last in, first out' ('LIFO') dan bahawa ia telah gagal untuk mengambil langkah-langkah munasabah untuk mencarikan pekerjaan alternatif. Responden pertama menegaskan lagi bahawa memandangkan Cheong telah dilantik sebagai pengurus jualan pada hujung tahun 1998, Cheong adalah *junior* namun dia tidak diberhentikan kerja. Perayu menegaskan perbuatan memberhentikan responden pertama adalah untuk sebab atau alasan yang adil, selaras dengan prinsip 'last in, first out'

('LIFO'). Mahkamah Perusahaan memutuskan berpihak kepada responden pertama, dan menambah bahawa perayu tidak berada dalam kedudukan yang lemah sehingga dia perlu memberhentikan responden pertama. Yang arif hakim bersetuju dengan dapatan Mahkamah Perusahaan. Di peringkat rayuan, peguam perayu menghujahkan bahawa kedua-dua Mahkamah Perusahaan dan yang arif hakim telah terkhilaf dalam mendapati bahawa ia tidak mematuhi prinsip LIFO.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Mahkamah Perusahaan dan yang arif hakim telah terkhilaf dalam memutuskan bahawa pemberhentian responden pertama adalah tanpa sebab atau alasan. Berdasarkan kepada keterangan, mahkamah mendapati bahawa perayu telah mematuhi prinsip LIFO (lihat perenggan 9 & 15).

(2) Mahkamah Perusahaan dan yang arif hakim telah terkhilaf dalam memutuskan bahawa responden pertama sebagai pengurus adalah lebih kanan daripada Cheong. Seperti yang terbukti oleh rekod rayuan, Cheong, pada hakikatnya, adalah lebih kanan daripada responden pertama dari segi perkhidmatan dan sebagai pengurus. Responden pertama telah dilantik sebagai pengurus jualan pada 7 April 1997 manakala Cheong yang menyertai syarikat perayu pada 22 November 1995 telah dilantik sebagai pengurus perkhidmatan teknikal berkuat kuasa 1 November 1996 (lihat perenggan 9).

(3) Tiada kewajipan ke atas perayu untuk menawarkan atau mendapatkan pekerjaan alternatif bagi responden pertama kerana penyusunan semula dijalankan dengan sah (lihat perenggan 14).

(4) Mahkamah Perusahaan telah terkhilaf apabila ia meneruskan untuk menentukan sama ada sebab pemberhentian responden pertama telah dibuat berdasarkan alasan yang tidak dipercayai oleh perayu. Surat pemberhentian telah menyatakan bahawa oleh kerana peluang perniagaan yang berubah-ubah, perayu telah menjalankan penstrukturan semula bagi menghadapi kemerosotan permintaan bagi produk-produk syarikat. Tiada dalam mana-mana surat tersebut yang menyatakan perayu berada dalam kedudukan kewangan yang lemah (lihat perenggan 13).]

Notes

For cases on retrenchment, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1286–1297.

Cases referred to

AMZ Corporation Sdn Bhd v Sye Ah Chai [1989] 1 MLJ 238, HC (refd)

Goon Kwee Phoy v J&P Coats (M) Bhd [1981] 2 MLJ 129; [1981] 1 LNS 30, FC (refd)
Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc [1998] 5 MLJ 535; [1997] 1 LNS 99, HC (folld)

Appeal from: Judicial Review No R3–25–92 of 2006 (High Court, Kuala Lumpur)

A Ramadass (M Jothiletchimy with him) (Ramadass & Associates) for the appelant.
Fadzil Abdullah (J Azmi & Associates) for the first respondent.

Aziah Ali JCA:

[1] The appellant appeals against the decision of the learned High Court judge who dismissed the appellant's application for judicial review to quash the Industrial Court Award No 437 of 2006 dated 12 March 2006. The Industrial Court held that the first respondent's retrenchment by the appellant on the ground of redundancy was without just cause or excuse. By a unanimous decision we allowed the appeal and set aside the order of the learned judge with costs of RM10,000 here and below to the appellant. The deposit was ordered to be refunded to the appellant.

BRIEF BACKGROUND FACTS

[2] The core business of the appellant is sales, marketing and servicing of spraying and glue application equipment. The appellant's business operation was divided into four sections namely Finishing Sales and Finishing Service ('Finishing Department') and Hotmelt Sales and Hotmelt Service ('Hotmelt Department').

[3] The first respondent commenced employment with the appellant as sales manager (finishing) on 7 April 1997. Another manager, Cheong Pak Fatt ('Cheong') joined the appellant company on 22 November 1995 and, based on the evidence, he was promoted to the position of technical services manager effective 1 November 1996 (see p 191 of the appeal record). In November 1997 the appellant company was reorganised and the first respondent headed the Finishing Department whilst Cheong headed the Hotmelt Department.

[4] According to the appellant after the financial crisis of 1998 the appellant suffered a financial crisis which the appellant says necessitated cost-cutting measures through restructuring of its management and operation of its business. In year 2001 the appellant experienced slackening demand for its products and loss in sales and in order to manage the fluctuating business opportunities, the appellant decided to consolidate the two sales departments which were managed by the first respondent and Cheong.

[5] The appellant states that after the consolidation the first respondent's position became redundant. On 22 November 2001 the appellant issued to the first respondent a retrenchment letter ('exh CL9'). The first respondent was paid his contractual payment of RM26,620.90 and a discretionary payment of RM17,832. The appellant contends that the retrenchment was in compliance with the principles relating to retrenchment and in compliance with 'last in first out' ('LIFO') principle. It is the appellant's case that the retrenchment of the first respondent was for just cause or excuse and in accordance with the rules pertaining to redundancy.

[6] The first respondent disputes the reasons given by the appellant for his retrenchment and contends that the appellant had deliberately failed to comply with established industrial principle of UFO. According to the first respondent the disregard for LIFO principle was done maliciously and with mala fide because Cheong, who was appointed as sales manager around the end of 1998 and was therefore junior to the first respondent, was not retrenched. It is contended that the first respondent's retrenchment was capricious, manifestly unreasonable and in violation of fair labour practices and carried out without just cause or excuse. The first respondent further contends that the appellant failed to make reasonable effort to look for alternative employment before pursuing its harsh decision to retrench him.

THE APPEAL

[7] Before us counsel for the appellant submits that both the Industrial Court and the learned judge have erred in finding that the appellant had not complied with LIFO. It is submitted that the evidence show that Cheong was more senior to the first respondent. In his written submissions counsel for the appellant referred to the memorandum of the appellant's managing director which shows that Cheong was promoted to the position of technical services manager effective 1 November 1996 (p 191 of the appeal record). Counsel further refers to the first respondent's testimony in cross-examination wherein the first respondent agreed that when he was appointed, Cheong was already a manager and, in terms of service, Cheong was senior to him by two years (see p 421 of the appeal record).

[8] In his grounds of judgment the learned judge accepted that managers should be treated as one class and the last to be appointed as manager should be the first to be retrenched (*AMZ Corporation Sdn Bhd v Sye Ah Chai* [1989] 1 MLJ 238). The learned judge agreed with the Industrial Court's finding that since Cheong assumed the post of sales manager several months later than the first respondent's employment as sales manager (finishing), the first respondent was senior to Cheong and, in retrenching the first respondent, the appellant had not complied with LIFO principles.

[9] We have perused the appeal record and find that the first respondent was appointed as sales manager, finishing on 7 April 1997 whilst Cheong who joined the appellant company on 22 November 1995 was appointed technical services manager effective 1 November 1996. Thus we agree with counsel for the appellant that on the evidence, Cheong was senior to the first respondent both in terms of service and as a manager. We find that the Industrial Court fell into error in finding that the first respondent, as manager, was more senior to Cheong and the learned judge, in concurring with the Industrial Court, had similarly erred. Both the Industrial Court and the learned judge had come to a conclusion which on the evidence they could not reasonably have come to. On the evidence before us we agree with counsel that the appellant had complied with the LIFO principle.

[10] The first respondent disputes the reasons given by the appellant for his retrenchment. In the letter of termination to the first respondent, the appellant states as follows:

> We now write to confirm the company has made a decision to consolidate two sales departments that currently exist in the company. The company is compelled to resort to this course of action in view of the fluctuating business opportunities the company is currently experiencing especially in view of the current economic conditions prevailing. The company's decision to consolidate two sales departments is necessary as a result of the restructuring exercise the company is undertaking currently to face the slackening demands for the company's products. It is hoped that with the restructuring exercise being implemented the company will be able to manage its business in a more efficient and profitable manner.

In *Goon Kwee Phoy v J&P Coats (M) Bhd* [1981] 2 MLJ 129; [1981] 1 LNS 30, Raja Azlan Shah CJ (Malaya) as His Highness then was, said, inter alia:

> If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

[11] The Industrial Court found that the appellant was not in a weak financial position based on the evidence which shows that for the financial year ending 30 September 2001 the appellant made an increased profit compared to financial year ending 30 September 2000. During the financial year that the first respondent was retrenched, the Industrial Court found that the appellant's profit decreased by 21% and revenue between year 2002 and 2001 had decreased by about RM1m. However the appellant's retained profits for year

2002 increased by about RM673,994. The learned judge found that the Industrial Court had come to a reasonable finding that the appellant's financial position was not weak.

[12] The appellant's case is that the retrenchment of the first respondent on the ground of redundancy was due to restructuring exercise necessitated by slackening demand for its products. In his written submissions counsel submits that the appellant anticipated that by consolidating the two departments, it can operate more efficiently. The retrenchment was based on anticipatory loss and by doing so, the appellant had improved its order bookings and there was a vast improvement in its order entry in year 2002 compared to year 2001. In support the appellant produced the chart of order entry (p 200 of appeal record). Counsel submits that insolvency is not the sole test for redundancy.

[13] We find that in the letter of termination the appellant had stated that due to fluctuating business opportunities the appellant had undertaken the restructuring exercise in order to face the slackening demands for the company's products. The appellant's contention of slackening demand for its products is supported by the finding made by the Industrial Court that during the financial year that the first respondent was retrenched, the appellant's profit decreased by 21% and revenue between year 2002 and 2001 had decreased by about RM1m. The finding that the appellant's retained profits for year 2002 had increased supports the appellant's contention that by consolidating the two departments, the appellant was able to manage its business in a more efficient and profitable manner. Thus we find the reason for the restructuring exercise was borne out by evidence. Nowhere in the said letter of termination did the appellant state that it was in a weak financial position. The Industrial Court has erred when it proceeded to determine whether the reason for the first respondent's retrenchment had been made out based on a reason not relied on by the appellant.

[14] The first respondent further complains that the appellant had failed to make any reasonable effort to look for alternative employment before retrenching him (para 22 of the first respondent's statement of case at p 78 of the appeal record). We refer to the judgment of Abdul Kadir Sulaiman J (as he then was) in *Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc* [1998] 5 MLJ 535; [1997] 1 LNS 99, as follows:

> The company after all was not obliged to make any offer for any alternative employment on account of the exercise properly carried out. Further, it was not mala fide on the part of the respondent not to consult or discuss with the applicant its determination to reorganise its company.

We respectfully agree with His Lordship and adopt the same in respect of this

case. We find there is no obligation on the appellant to offer or secure alternative employment for the first respondent on account of the restructuring exercise validly carried out.

[15] For the reasons stated above we find that both the Industrial Court and the learned judge have erred in finding that the termination of the first respondent's employment was without just cause or excuse. Therefore we allowed the appeal and set aside the decision of the learned judge. Consequently prayer (i) of the application for judicial review for an order of certiorari is allowed and the award is hereby quashed. The first respondent is ordered to refund all monies paid by the appellant pursuant to the award.

Appeal allowed and decision of the High Court set aside.

Reported by Ibnu Aswan